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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

SUZANNE D. KOCAK,

Petitioner,

v.

COMMUNITY HEALTH PARTNERS OF OHIO, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

DOUGLAS L. WINSTON, ESQ.
Counsel of Record

BERGER & ZAVESKY CO., L.P.A.
1425 ROCKEFELLER BUILDING
614 WEST SUPERIOR AVENUE
CLEVELAND, OH 44113-1349
(216) 830-9000

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

Petitioner, who resigned her employment because of a complicated pregnancy that caused alterations of her scheduled hours, established that her application for reemployment was denied, in part, because of stated concerns she might become pregnant again and cause scheduling difficulties. Statements were uttered following the submission of her application that she might have another complicated pregnancy and cause scheduling problems. The reasons proffered by her former employer for denying her application were that she was perceived as selfish by her former co-workers and disliked by them. The district court granted summary judgment on petitioner's claim of pregnancy discrimination holding the statements related to the apprehension of another pregnancy was not direct evidence of sex or pregnancy discrimination because she was not pregnant at the time she sought reemployment. The court of appeals determined the district court erred because discrimination based on potential pregnancy is prohibited. It affirmed, however, because it found there was unrefuted evidence that petitioner was difficult to contact during her employment and there were difficulties in scheduling her hours. It thus determined that petitioner's evidence was not direct for that reason. Assuming the statements were direct evidence of discrimination, the court of appeals further held that petitioner's claim failed because she did not establish that the reasons proffered by the employer were pretextual.

The questions presented are as follows:

1. Whether the classification of petitioner's evidence as direct evidence was nullified by evidence that she had difficulties related to her scheduled hours and was difficult to contact?

2. Whether, in the face of direct evidence, petitioner had to show pretext in order to establish a claim of sex or pregnancy discrimination?

PARTIES TO PROCEEDING

The parties to this proceeding are listed in the caption of this matter.

RULE 29.6 STATEMENT

Petitioner is an individual. No corporate disclosure statement is required.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Suzanne Kocak ("Kocak") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as *Kocak v. Community Health Partners of Ohio, Inc.*, 400 F.3d 466 (6th Cir. 2005). (App. at 3a-13a). The court of appeals affirmed the November 25, 2003 decision of the United States District Court for the Northern District of Ohio, Eastern Division. (App. at 16a-32a).

Petitioner's petition for rehearing *en banc* filed with the court of appeals on March 17, 2005 was denied, without opinion. Order issued May 17, 2005. (App. at 1a-2a).

JURISDICTION

The court of appeals issued its opinion on March 11, 2005 and its order denying rehearing on May 17, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a)(1) provides, in part, that "[i]t shall be an unlawful employment practice for an employer ... to fail or refuse to hire ... any individual ... because of such individual's race, color, religion, sex, or national origin."

In pertinent part, 42 U.S.C. § 2000e(k) states that the "terms, 'because of sex' or 'on the basis of sex' include, but

are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."

42 U.S.C. § 2000e-2(m) provides "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

42 U.S.C. § 2000e-5 (g)(2)(B) provides that "[o]n a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment described in subparagraph (A)."

These provisions have been reproduced in the appendix at F. (App. at 35a-38a).

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit affirming a decision of the United States District Court for the Northern District of Ohio.

The gravamen of Kocak's claim arising under 42 U.S.C. § 2000e-2(a)(1) ("Title VII") is that she was denied

employment as a nurse on the basis that she might become pregnant again and cause scheduling difficulties for her employer. Specifically, her charge submitted with the Equal Employment Opportunity Commission ("EEOC charge") stated she had resigned her employment with Community Health Partners of Ohio, Inc. ("CHP") in January of 1999 because of a complicated pregnancy. A manifestation of her complicated pregnancy required the alteration of her working schedule. She sought reemployment with CHP in January of 2000 and, according to her EEOC charge, around June 1 of 2001. On both occasions she sought employment in the Women's and Children Department of CHP. On each occasion following the submission of her applications an Elizabeth Finnegan informed Kocak that she and Melanie Meyer, who was charged with hiring nurses in this department, had concerns that Kocak might have another complicated pregnancy and cause scheduling problems. Finnegan further informed Kocak that Meyer also stated she did not like how Kocak's former pregnancy affected scheduling in the past and that Meyer did not want to deal with that issue again. Finnegan uttered these statements when petitioner had inquired about the status of her applications. At the time these statements were uttered, Finnegan was the director of this department and Meyer was the manager thereof. Meyer had been Kocak's manager in 1999 when Kocak resigned.

Through Finnegan, CHP maintained that Kocak's application submitted in May of 2001 was denied because others who had worked with Kocak informed Finnegan they did not view Kocak as a team player. They also stated Kocak put her own interest ahead of her patients and co-workers. While not clear when Finnegan was informed of these concerns, CHP's records show that Meyer denied consideration of Kocak's application a day after it was

submitted. The application was submitted on May 3, 2001 and Meyer denied consideration thereof on May 4, 2001.

Petitioner filed her complaint in the United States District Court for the Northern District of Ohio on October 11, 2002 seeking relief under Title VII for the denial of her application submitted in May of 2001.[1] On October 1, 2003, CHP filed its Motion for Summary Judgment under Federal Rules of Civil Procedure 56 (the "Motion"). The district court entered its order on November 25, 2003 granting the Motion. The district court determined the statements uttered following petitioner's application in May of 2001 did not consist of direct evidence because Kocak was not pregnant at the time she sought reemployment.

Petitioner filed her appeal on December 12, 2003. The decision of the court of appeals was entered on March 11, 2005. It determined the district court erred as the capacity to become pregnant is protected under Title VII. It affirmed the grant of the Motion, however, finding that Kocak's evidence was not direct because the evidence was "unrefuted" that Kocak was unreliable in scheduling her hours and difficult to contact. It reasoned that "[t]o conclude that the obstetric unit manager's comment about scheduling difficulties relating to her last pregnancy demonstrates an anti-pregnancy animus and not a non-discriminatory concern about Kocak's past scheduling difficulties – difficulties extending further back than the pregnancy – requires an inference." *Kocak*, 400 F.3d at 470.

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[1] The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, based on the Title VII claim presented in the complaint.

Assuming Kocak's evidence was direct, however, it further determined that Kocak could not establish pretext. The court of appeals opined that CHP "offered substantial evidence that it decided not to rehire Kocak because she was an unreliable employee and was avidly disliked by her peers" and that Kocak did not offer evidence showing that these reasons were pretextual. *Id.* at 471. It concluded that summary judgment was proper as Kocak would not have been hired absent the discriminatory statements.

Petitioner timely filed her petition for rehearing *en banc* on March 17, 2005 addressing these determinations and the stated concerns that Kocak might have another complicated pregnancy and disrupt scheduling. On May 17, 2005 the court of appeals denied the petition for rehearing *en banc*, without opinion.

REASONS FOR GRANTING THE PETITION

This petition for a writ of certiorari should be granted for two principal reasons. First, the decision of the court of appeals squarely contradicts the analysis of this Court regarding direct evidence and undermines the mandate of Congress in amending Title VII. As noted in an amendment to Title VII, where there's a nexus between the statements uttered and the employment decision, direct evidence exist and irrespective of countervailing factors motivating the decision. Secondly, and for like reasons, the court of appeals' decision conflicts with Congress' mandate that an employer cannot raise an affirmative defense to liability when direct evidence exist. This Court's guidance is needed to address these issues of national importance, issues that implicate federal law governing Title VII claims. It's also needed as the decision of the court of appeals regarding